



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 105 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ALLEGED THREAT OF CONTRAVENTION OF ARTICLES 22,

23, 27, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ATTEMPTED IRREGULAR CANCELLATION OF

CLINICAL PRIVILEGES OF THE PETITIONER BY THE RESPONDENT

BETWEEN

DR. EDNAH KEMUNTO GISORE.....PETITIONER

VERSUS

THE AGA KHAN UNIVERSITY HOSPITAL.....RESPONDENT

JUDGMENT

The petitioner herein is a Medical Doctor while the respondent is a university teaching hospital. The petitioner first joined the respondent in 2006 when she successfully applied for a scholarship at the respondent's post-graduate programme to study anaesthesiology. During her training she was offered appointment as a Resident in the Department of Anaesthesia reporting to the Program Director of the Residency Training Programme. Upon completion of training she was offered employment as a Full Time Faculty in the Department of Anaesthesia with effect from 1st January 2010 on renewable one year contracts. By letter dated 22nd August 2012 the petitioner was promoted to Senior Instructor, Department of Anaesthesia effective 2nd April 2012. The petitioner was by letter dated 16th January 2014, further promoted to the rank of Assistant Professor and full time clinical practitioner.

In addition to being an employee of the respondent the petitioner was granted clinical privileges on 21st May 2012 for a term of three years ending May 2015. The clinical privileges gave her rights to practice as a private medical practitioner and to admit her own patients at the hospital. Upon expiry thereof, the same was renewed by letter dated 9th May 2018.

The petitioner gave notice of resignation from her position as Full Time Faculty member by letter dated

1st April 2019. Her three months' notice was to take effect on 30th June 2020. The resignation was accepted by the respondent by letter dated 2nd May 2019. The letter accepting the resignation is reproduced below –

“Faculty of Health Sciences

Medical College

Ref: HR/ NON-UNION/22903/19

2nd May 2019

Dr. Ednah Kemunto Gisore - Emp. No. 000043

Department of Anaesthesia

Medical College Division

AKU

Dear Dr. Gisore,

RE: RESIGNATION ACCEPTANCE

We refer to your resignation letter dated 1st April 2019. As desired, the management has accepted your resignation with regrets and your last working day will be 30th June, 2019.

On presentation of a duly signed clearance form, to the Financial Controller, the following payments will be made to you, less any monies owed to the Institution;

§ Salary up to 30th June 2019

§ Encashment of 7 working leave days as at 30th June 2019

Your pension funds will be paid upon you completing and executing the necessary withdrawal forms and returning the same to Human Resource Office for further action. The payments will be based on the scheme rules and regulations currently applicable.

As part of the clearance process, you are required to undergo a post-employment medical examination. Your appointment has been booked for 28th June, 2019 at 08:30 am. Kindly confirm your availability with the Human Resources Office on receipt of this letter. Your exit interview has been scheduled for 28th June, 2019 at 2.00 p.m.

We would like to thank you for the services you have rendered to the institution and wish you best of luck in your future endeavours.

Yours Sincerely

SIGNED

Sammy Chepkwony

Regional Director, Human Resources, EA

Cc: Financial Controller

Debtors”

On 10th June 2019 the University of Nairobi wrote to the respondent seeking permission for the petitioner to continue treating its staff at the hospital in her private capacity.

The last two paragraphs of the letter which are material to this suit are reproduced below –

“It has come to our attention that Dr. Ednah Gisore has resigned from Full Time Faculty but she is willing to continue taking care of our UON patients in her private capacity. The University of Nairobi wishes to continue using her in your institution.

We wish to request that this transition process remains seamless. This would ensure that the QOC of our UON patients in your institution is not affected. Kindly advise us accordingly so we make informed management decisions.”

In reaction to the letter from the University the respondent wrote to the petitioner another response to her letter of resignation, informing her that she would automatically relinquish her clinical rights upon her resignation taking effect. The letter which is dated 17th June 2019 is reproduced below –

June 17th 2019

Dr. Ednah Kemunto Gisore - Emp. No. 000043

Department of Anaesthesia

Medical College Division

Dear Dr. Gisore,

RE: APPLICATION OF CLINICAL PRIVILEGES

We refer to your resignation letter dated 1st April, 2019, the resignation acceptance letter dated 2nd May, 2019 and to a letter dated June 10, 2019 drawn by the Acting Deputy Chief Medical Officer, University of Nairobi Health Services.

The letter dated June 10, 2019 which was addressed to our Chief Executive Officer and to the Dean, Medical College for East Africa sought the Management’s authorization that you retain your Clinical Privileges even after your resignation. Kindly note that in due compliance to Section 3.4 of the Aga Khan University Hospital Medical Staff Bylaws 3rd Edition, 2017 we are constrained not to allow the request made in the aforementioned letter now that it was agreed that your last working day shall be on 30th June 2019, it then follows that your Clinical Privileges shall also automatically be relinquished effective that very same date.

We thank you for the services that you have rendered to our institution and wish you all the best in your future endeavours.

Yours sincerely.

SIGNED

Sammy Chepkwony

Regional Director, Human Resources, EA”

The Petitioner was aggrieved by the letter and filed the instant petition. In the petition dated 24th June 2019 and filed on the same date the petitioner seeks the following remedies –

1. A declaration that the conduct of the Respondent violates the Petitioner fundamental rights and freedom guaranteed under Article 27, 41, 47 and 50 of the Constitution of Kenya 2010, as relates to dispute resolution.
2. An Order quashing the letter dated 17th June 2019 from the respondent to the extent it purports to cancel the clinical privileges of the petitioner on the 30th June 2019
3. Costs of the petition to be borne by the respondent.

Simultaneously with the petition the petitioner filed a notice of motion dated 24th June 2019 seeking the following orders that–

1. This Court be pleased to certify this application as urgent, dispense with service and the same be heard ex-parte in the first instance.
2. This Court be pleased to suspend the letter from the Respondent herein dated 17th June 2019 to the extent it purports to cancel the clinical privileges of the Petitioner on the 30th June 2019 pending the hearing of this application, inter-parties.
3. This Court be pleased to suspend the letter from the Respondent herein dated 17th June 2019 to the extent it purports to cancel the clinical privileges of the Petitioner on the 30th June 2019 pending the determination of this application.
4. This Court be pleased to suspend the letter from the Respondent herein dated 17th June 2019 to the extent it purports to cancel the clinical privileges of the Petitioner on the 30th June 2019 pending the hearing and determination of the Petition herein.
5. That costs of this application and Petition be provided for.

The application which was filed under certificate of urgency is supported by the grounds on the face thereof and petitioner's affidavit sworn on 24th June 2019.

I heard the petition ex parte on 24th June 2019 and granted interim orders as follows –

1. That the application is certified urgent and fixed for hearing interpartes on 8th July 2019.
2. That in the meantime the Claimant's Clinical privileges granted/renewed by letter dated 9th May 2018 are preserved pending inter partes hearing of the application herein.
3. That Applicant to serve the Respondent before close of day on 25th June 2019.

When the application came up for interpartes hearing on 8th July 2019 the court consolidated the application with the petition for expediency and directed parties to file skeleton submissions which were to be highlighted on 31st July 2019. However, on that date Counsel for the respondent was indisposed. The parties eventually highlighted the submissions on 12th November 2019.

Petitioner's Case

The petitioner's case is that her appointment as full time faculty member on 23rd December 2009 was distinct and separate from her admission rights and privileges. She points out that her employment

contracts did not mention admission rights. That the letter renewing her privileges dated 9th May 2018 is valid for 3 years and will expire in 2021. That the respondent has sought to cancel her admission rights to punish her for her resignation as a fulltime member of the faculty.

It is the petitioner's submission that she was conferred admission rights under the Respondent's Bylaws 2010 as amended by Bylaws 2017. Paragraph 2.3.3 of Bylaws 2010 defined Active Medical Staff as–

“2.3.3 Active Medical Staff

Active Medical Staff shall consist of Practitioners, including Faculty of the ranks of Senior Instructor and above, who regularly admit and attend to patients at the Hospital, are located within or close enough to the Hospital to provide active and continuous care to their patients, and shall assume all the functions and responsibilities of membership on the Active Medical Staff, including, where appropriate, emergency consultation and care. Active Medical Staff shall demonstrate substantial commitment to the welfare and Programmes of the Hospital, and specify such commitment as part of the appointment/reappointment process.”

Counsel for the petitioner Prof. Wangai submitted that the privileges existed even for practitioners who were not members of the faculty. He submitted that in the amended Bylaws of 2017, Article 2.3.2 defines Active Medical Staff to exclude those already privileged. That the petitioner is excepted as she was already privileged under the 2010 Bylaws and is not caught up by the amendment of 2017. That by terminating her admission rights the respondent discriminated against her since the admission rights of other private practitioners who were not members of Faculty were excepted by the 2017 Bylaws.

It is submitted that the letter conferring rights to admission does not provide that the rights are subject to the Petitioner being a fulltime member of faculty. That since the rights of admission and the faculty membership were conferred by different instruments, the petitioner retained her rights to admission after her resignation.

Respondent's Case

The respondent opposed the petition by a replying affidavit of Dr. MAJID TWAHIR sworn on 4th July 2019. In the affidavit, Dr. Twahir deposes that the Respondent has invested a great deal in the petitioner and was, until period shortly before her resignation, happy with her work. That her appraisals were positive though her performance did begin to deteriorate once a surgeon she preferred to work with left the Respondent's employment.

That it came as a surprise to the Respondent, when quite abruptly, on 1st April 2019, the Petitioner tendered her resignation giving a three-month termination notice in terms of her contract. No reasons were given for her decision. She expressed her gratitude to the Respondent.

That by its letter of 2nd May, 2019, the Respondent accepted the Petitioner's resignation confirming that her last day of employment would be 30th June, 2019. In light of Section 3.4 of the 2017 Bylaws, upon her resignation, the Petitioner's clinical privileges were relinquished. That as a faculty member in the role of a Clinical Practitioner, the Petitioner's position was tied to her position with the Respondent and could not extend past her employment.

That the renewal of the Petitioner's clinical privileges by the Respondent's letter of 9th May, 2018 was made in line with, inter alia, the 2017 Medical Staff Bylaws which were in force at the time of the said renewal. That the Medical Staff Credentialing and Privileging Policy dated 15th March, 2006 and revised on 15th March, 2018, is explicit that it is the 2017 Bylaws that apply. That it is these Bylaws that were applied when renewing the Petitioner's privileges.

That when University of Nairobi wrote to the Respondent seeking extension of the petitioner's clinical privileges, they were simply reminded that by her resignation, the Petitioner had relinquished her clinical

privileges and she was no longer a faculty member, she was not entitled to be granted any.

That the Respondent's letter of 17th June, 2019 did not make any decision or take away the Petitioner's clinical privileges. Those clinical privileges were lost as a result of the petitioner's voluntary decision to resign. That there is nothing to suspend in respect to the letter either as sought in the Said Application or at all.

Mr. Darr for the Respondent submitted that the petition suffers from two grave jurisdictional challenges, the first being that after resigning, the petitioner is no longer an employee and cannot invoke jurisdiction of this court under the Constitution or Section 12 of the Employment and Labour Relations Court (ELRC) Act. The second is that she seeks to revoke the letter dated 17th June 2019 that did not revoke any clinical privileges but only informed her that clinical privileges had relinquished pursuant to Bylaws of 2017.

It is submitted that as a teaching hospital, which was part of the Aga Khan University Hospital (AKUH), it was necessary that the services provided at AKUH and the charges be standardized, monitored and enforced in line with its mission, objectives and values, something that would only be possible if all the medical staff working at the hospital were full-time members of the faculty. That this was also necessary to develop and nurture future members of the medical profession.

That to this end AKUH began the process of transitioning, part of which involved amending its Medical Staff Bylaws, 2nd Edition which were then in force to align it with this primary objective. That the process of revising the 2nd Edition of the Bylaws was a year-long interactive and fully consultative initiative process in which the different cadre of medical staff was involved. One of the most important provisions was the restriction of clinical privileges to full time faculty members.

That a concern was raised by the medical practitioners in private practice who had clinical privileges at AKUH and its predecessor institution for a long time, whether they would simply lose their clinical privileges once the 3rd Edition of the Bylaws was adopted.

That in order to allay fears of the practitioners who had historically obtained clinical privileges the 2017 Bylaws introduced Section 2.3.2 which provides that –

“2.3.2 Active Medical Staff

Except those already privileged from the date of the approval of the 3rd Edition of the Medical Staff Bylaws. Active Medical Staff shall consist of Practitioners, including Faculty of the ranks of Senior Instructor and above, who regularly admit and attend to patients at the Hospital, are located within or close enough to the Hospital to provide active and continuous care to their patients, and shall assume all the functions and responsibilities of membership on the Active Medical Staff, including, where appropriate, emergency consultation and care. Active Medical Staff shall demonstrate substantial commitment to the welfare and Programmes of the Hospital, and specify such commitment as part of the appointment/reappointment process.”

It is submitted that the privileges conferred to the petitioner were a direct result of her contract. That this was very distinct from private practitioners who applied while not being faculty members.

Mr. Darr submitted that discrimination as alleged by the petitioner had not been established. That discrimination would arise where some groups of individuals with the same rights are treated differently. He submitted that what the petitioner was attempting to do was to use alleged contractual rights to establish constitutional rights. Mr. Darr submitted that in the case of **Turkana County Government and 20 Others v Attorney General and Others 2016** a 3-Judge bench stated that not all statutory contract violations result in constitutional violation. He submitted that the petitioner had not established constitutional violation.

Mr. Dar further submitted that this court was the wrong forum for the petitioner, relying on the decision

in the case of **Maurice Adongo Anyango v Kenyatta International Convention Centre (2018) eKLR** where the Court of Appeal stated –

*“Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or Act of Parliament, that procedure should be strictly followed. See for instance **Speaker of the National Assembly v Karume** (supra). The appellant’s claim was based on a contract of employment. A specialized court exists to deal with employment matters, and it would cause jurisdictional rivalry and/or confusion if courts would allow litigants to shuffle between any courts, even if they are of equal status.*

He further submitted that in the case of **Peter Nderitu v Teachers Service Commission (2019) eKLR**, Mbaru J. cautioned–

“That is apparent to the court the claims made relate to an ordinary employer and employee relationship and the remedies sought can only issue pursuant to statute under the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 and to file a petition instead of a Memorandum of ‘Claim the time bar cannot be cured.’”

Mr. Darr submitted that since the petitioner’s employment ceased, what we have is a constitutional petition brought before an employment court. To emphasise this position he relied on the case of **Peter Ndegwa v Teachers Service Commission** where the court stated that –

*“It is trite all employment and labour relations claims should be filed with the court within the provisions of Section 90 of the Employment Act, 2007 as held by the Court of Appeal in the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR...***

Despite the petitioner citing the violation of his rights under the various articles of the constitution, and supporting the facts of the petition with a chronology of the violations against him, the remedies sought can only issue within the framework of the provisions of section 90 of the Employment Act, 2007.”

Relying on the Court of Appeal decision in **Eric V. J. Makokha and 4 Others Lawrence Sagini and 2 Others (1994) eKLR**, Mr. Darr submitted that the petitioner’s clinical privileges arose from her employment contract and therefore were relinquished upon the termination of the employment contract. That privileges attached to employment cannot be enjoyed after the employment relationship ceases. That under Clause 10 of her contract the petitioner agreed that medical staff Bylaws as revised from time to time will be binding on her. That based on clause 10 of her employment contract paragraph 3.4 of the Bylaws applied to her. That the clinical rights were not envisioned to outlive the contract of employment.

In closing Mr. Darr submitted that the petitioner had not established any constitutional violation in order to be entitled to the reliefs sought relying on the decision in **Trusted Society of Human Rights Alliance v Attorney General and 2 Others (2012) eKLR**. He submitted that the violations of Articles 41, 47 and 50 of the Constitution had not been established as alleged in the petition. He urged the court to dismiss the petition.

In a brief rejoinder Prof. Wangai for the petitioner submitted that the decisions relied upon by the respondent are distinguishable from the instant petition as they all relate to wrongful termination of employment and are thus not relevant. That the jurisdiction of this court as relates to employment matters is superior. That this matter springs out of issues relating to employment. That had there been no employment relationship this dispute would not have arisen.

He submitted that Section 3.4. of Bylaws is on relinquishing of privileges while the letter dated 17th June 2019 was withdrawing privileges. That the said Section 3.4. is couched in draconian terms as it suggests that the decision shall be final without a right of a hearing. That the right to be heard cannot be taken away. He reiterated that the petitioner resigned from full faculty but not from active member of Aga Khan Hospital. That relinquishing one does not relinquish both.

Counsel submitted that Chapter 4 of Bylaws on procedure for revoking privileges was not followed. That it is misleading to say the committee was disciplinary.

Determination

I have considered the pleadings, submissions and authorities filed by the parties. The issues arising for determination are the following –

1. Whether this court has jurisdiction to hear this petition;
2. Whether the petitioner's clinical rights were part of the privileges attached to her employment;
3. Whether the petitioner's rights under Articles 27, 41, 47 and 50 have been violated by the respondent; and,
4. Whether the petitioner is entitled to the remedies sought.

Jurisdiction

The jurisdiction of this court is conferred by Article 162(2) of the Constitution and section 12 of the ELRC Act. In the case of **United States International University (USIU) v The Attorney General**

Since the Industrial Court as presently constituted has the status of the High Court, it is the proper forum for dealing with this matter as it arises from an employer-employee relationship notwithstanding that the matter concerns the interpretation of the Constitution. The interpretation of the Constitution is incidental to its core jurisdiction of determining labour and employment matters.

Mr. Dar has submitted that the petition herein is wrongly before this court as the petitioner is no longer an employee of the respondent and therefore there is no issue of employment relationship for determination herein. I find this quite contradictory as he has also argued that clinical rights of the petitioner were conferred upon her by virtue of her employment, which would put the petition squarely under the jurisdiction of this court. It is my view that because the Respondent's position is that the clinical rights were part of the petitioner's employment rights which were extinguished by the relinquishing of the resignation, this is the proper court to deal with this petition as the issue for determination is whether or not the clinical rights were part of the petitioner's employment rights and whether her resignation from employment automatically terminated her clinical rights.

Clinical Privileges

The Clinical privileges of the petitioner were first granted by letter dated 21st May 2012. To demonstrate its full tenor and purport, the letter granting the petitioner clinical rights is reproduced below –

21st May 2012

Dr. Edna K. Gisore

c/o AKU - PGME 6th Floor

NAIROBI

Dear Dr. Gisore

Re: Clinical Privileges – Department of Anaesthesia

We are pleased to inform you that the Credentials Committee has approved your request for clinical privileges. This grant of privileges is effective from the date of this letter and is valid for three (3) years up to May, 2015.

The practising privileges granted will allow you to only perform such medical acts, operations and procedures for which you know yourself to be adequately trained and for which you remain competent. Enclosed is a copy of the privileges granted.

§ You have an obligation to remain competent in every area for which you have privileges.

§ You are expected to involve relevant expertise from within the institution for cases that you deem to need such expert input. This includes patients admitted into the Intensive Care Unit.

§ You are expected to adhere to the Medical Staff Bylaws of the Aga Khan University' Hospital, Nairobi.

§ You are expected to regularly update your records with us, forwarding your current Indemnity and Practising License to the Office of the Chief of Medical Staff.

On behalf of the Hospital Management and staff, we take this opportunity to congratulate you and to once again welcome you to the Aga Khan University Hospital, Nairobi Medical Staff team, where we strive to provide quality healthcare to our patients. We hope that your association with the Hospital will be a long and happy one.

Yours sincerely,

SIGNED

Dr. John Tole

Associate Dean Clinical Affairs and

Chief of Medical Staff”

Upon expiry, the petitioner applied for renewal of the clinical privileges and was granted an extension of another 3 years. The letter of renewal of the clinical privileges is also reproduced below –

“9th May 2018

Dr. Gisore Ednah Kemunto

c/o Dept, of Anaesthesia

6th floor, ETB

AKUH, N

Dear Dr. Gisore

Re: Renewal of Clinical Privileges – Anaesthesiology

The AKUH, N Medical Staff Bylaws require that admitting medical staff must have a minimum number of patient contacts/admissions.

Having met this provision and in line with our AKUH, N Credentialing and Privileging Policy and the Medical Staff Bylaws, we are pleased to inform you that your Clinical Privileges have been renewed, as previously delineated, for a period of three (3) years, with effect from 1st June 2018 and are valid up to 31st May 2021. If you wish to apply for new/additional clinical privileges, you will be required to apply for those specific additional privileges.

Within this period, please ensure that your records are updated by submitting your annual Private Practice Licence and valid Life Support Certificates to the Chief of Staff office.

The status of your current Life Support Certification is as follows: ACLS (6th July 2017 to 6th July 2019).

The renewal of admitting rights and Clinical privileges is determined by your patronage in terms of patient contacts/ numbers and utilization of the diagnostic facilities and adherence to Hospital rules and regulations. As an Admitting Medical Staff, you will go through an Ongoing Monitoring and Evaluation exercise (OME), leading to an Annual Appraisal, which is mandatory, and whose aim is to ensure all patients at AKUH, N receive safe care.

We look forward to your continued cooperation and contribution in making AKUH, N a Centre of excellence in providing Quality and Safe Health Care.

Sincerely,

SIGNED

Dr. Majid S. Twahir

Associate Dean Clinical Affairs & Chief of Medical Staff”

The petitioner’s letter of appointment does not make any reference to clinical privileges. The letter is reproduced below –

April 16, 2014

Dr. Ednah Gisore

Associate Professor

Department of Anaesthesia

Dear Dr. Gisore,

The Aga Khan University (AKU) is pleased to offer you employment as Assistant Professor in the Department of Anaesthesia effective January 1, 2014. The AKU Charter assures you the privileges of a University Faculty member.

will report to the Chair, Department of Anaesthesia and/or such other person as may be designated by him/her. Other terms and conditions of your employment are given below.

1. PRIMARY ROLE AND TIME ALLOCATION

Based on agreement between you and the Department Chair, you will be employed as a full-time academic faculty in the role of Clinician Practitioner. The allocation of clinical and non-clinical time in relation to clinical and non-clinical responsibilities is provided in Annexure I.

2. REMUNERATION

Your monthly remuneration effective January 1, 2014 based on the above will be Kshs.1,495,733.00, (the break-up of which is given in Annexure I. This is inclusive of your annual increase for 2014.

Your clinical income will be monitored and will be split between the AKUHN and yourself as per the following arrangement: For clinics, 85% of the professional fees will be retained by you; forward rounds, 35% of the professional fees will be retained by you while for procedures you will retain 75% of the professional fees. You will be entitled to receive on an annual basis, any earnings over and above the annual target. Such earnings will be paid out in July for the preceding six months at 80%; (the remainder will be paid out in January of the following year. At the end of the one year period, your annual clinical earnings will be reviewed and the clinical base adjusted based on the trend for the year (Annexure I). The allocation of clinical income will be reviewed with faculty from time to time and may be adjusted following this consultation at the discretion of the University.

Your non-clinical base is allocated in relation to expected non-clinical deliverables aligned to your role and as defined below. You may earn additional income from non-clinical services (e.g. external grants, technical consultation). This funding source will be allocated in accordance with institutional policies and must have the approval of the Department Chair, Dean and CEO.

3. EXPECTATIONS

Specific deliverables are captured in the Letter of Expectation which is completed in collaboration with and the final approval of the Chair. The Letter of Expectation is adjusted as required through the annual performance review. In accordance with the Conditions of Appointment, your current role may change over your professional career based on your interests and the capacity of the university to accommodate those interests. Any change in role requires the approval of the Chair, Dean and CEO.

4. BENEFITS

In addition to your salary, you will be eligible for benefits in accordance with University policies, which may be revised from time to time. A summary of the benefits currently applicable at your level is given in Annexure II.

5. TAXES

Taxes on your salary will be deducted in accordance with Kenyan tax law each month. Filing of personal tax returns is your responsibility. Moreover, any liability that arises in future for your taxes is your responsibility and you agree to make payment to the University for any tax recovered by FBR from the University on your behalf.

6. APPRAISAL

Promotion through faculty ranks will be based on the Appointments and Promotions Guidelines of the Medical College. Your annual performance appraisal and promotion through faculty ranks will be based on your agreed role and achievements against agreed expectations. The Appointments and Promotions Guidelines state that the Clinician Practitioner role will have a:

“predominant commitment to provide, advance, and promote excellence in clinical care and to tribute a sustained and cumulative body of scholarship that is focused on clinical care and/or the health care system. Correspondingly, the principal considerations during annual appraisals and > moderation for promotion will be the quality of their clinical care (beyond quantity and in addition to patient satisfaction), the teaching inherent in their practice, and

scholarly contribution to their field of Merest (e.g. innovations in practice, introduction of new methods, translation of knowledge to practice; quality and safety) that has resulted in recognition at a local/national/ regional/international level. Clinician faculty will be expected to contribute substantially to teaching as an integral and essential component of their clinical practice. They will be expected to participate but not necessarily lead in research projects. Administrative involvement, by membership on service related committees or more substantive roles will be expected and recognized."

The annual appraisal will include monitoring of ongoing Professional Practice Evaluation Standards. Please refer to the revised faculty Appointments & Promotions Guidelines for detailed descriptions.

7. NOTICE PERIOD

Either party will have the option to terminate the appointment by giving three months' notice or payment of salary in lieu of the notice period.

8. CONFLICT OF INTEREST

As per the terms of the University's "Conflict of Interest" policy, the actions and involvements (professional or personal) of faculty/staff should not in any way conflict with the interests of the University directly or indirectly. Full-time employees of the University are not permitted to be engaged in employment, business or service with another organization or have any financial/business interest with any other organization/entity even on a part-time or temporary basis.

9. CONFIDENTIALITY

You shall not disclose or divulge except to persons having authority to require such disclosures, any confidential information with respect to the University and also matters related to patients. The obligation of confidentiality shall survive the expiration or the termination of this contract. You have agreed not to do anything which would prejudice the interest of the University. The terms of this offer are confidential and form the basis of a contract between you and the University.

10. OTHER TERMS AND CONDITIONS

While your primary clinical setting will be at AKUHN, you may be assigned clinical or non-clinical responsibilities at AKUHN outreach sites, AKHS health facilities or sites where AKU has affiliated for purposes of clinical service, teaching and/or research.

Other terms and conditions of your employment will be in accordance with the Medical Staff By-laws and University policies which may be revised from time to time. The current policies are available on the Intranet.

We are confident that the revised Faculty Conditions of Appointment will enable faculty to better capitalize on their strengths and specific areas of interest, and contribute more fully to the realization of the academic mandate and strategic goals of Aga Khan University.

Please sign below on the duplicate copy of this letter as confirmation of your acceptance of the above terms and conditions and return to your Chair by April 30, 2014.

Yours sincerely,

SIGNED

Dr. Vitalis Mung'ayi

Chair, Department of Anaesthesia”

The letter does not make any reference to clinical privileges.

In the replying affidavit of Dr. Majid Twahir, he deposes as follows at paragraphs 14 – 19:

“Prior to its establishment as a university hospital, the institution was operated by the Aga Khan Health Services Kenya, (a Company limited by guarantee) as a private non-profit hospital, then known as, “The Aga Khan Hospital, Nairobi.” In addition to its own staff, qualified doctors in private practice were granted Clinical privileges in line with the Hospital’s Medical Staff Bylaws as amended or revised from time to time which enabled them use the facilities and other services available (admission to wards, laboratory, etc) at the hospital on specified terms and conditions. The Hospital had little control over the standard and quality of services which such private practitioners offered their own patients nor the rate of their privileges. Such private practitioners were not subject to the supervision or control of the AKHSK.

After the Aga Khan Hospital, Nairobi was transformed and changed its name to. “The Aga Khan University Hospital, Nairobi” AKUH, two distinct categories of qualified medical doctors were granted Clinical privileges for a defined period upon application:

a) Full-time faculty who are employees of AKUH hired for particular positions as Clinical Practitioners upon application in their areas of specialization. Those privileges were always in granted on the premise that they are full time faculty.

b) Private practitioners that is AKUH extended the same privileges to doctors in private practice as stipulated in the Bylaws.

As a teaching hospital, which was part of the Aga Khan University, it was necessary that the services provided at AKUH and the charges for them be standardized, monitored and enforced in line with its mission, objectives and values, something that would only be possible if all the medical staff working at the hospital were full-time members of the faculty. It was also necessary to develop and nurture future members of the medical profession.

To this end, AKUH began the process of transitioning, part of which involved amending to Medical Staff Bylaws, 2nd Edition which were then in force to align it with this primary objective. So far as material these proceedings was Section 2.3.2. relating to clinical privileges. It was proposed to revise it and restrict such clinical privileges to full-time faculty only.

The process of revising the 2nd Edition of the Bylaws was a year-long interactive fully consultative process in which both cadres of medical staff were involved. One of the most important provisions was the restriction of clinical privileges to full time faculty members.

A concern was raised by the medical practitioners in private practice who had had clinical privileges at AKUH and its predecessor institution for a long time, whether they would simply lose their clinical privileges once the 3rd Edition of the Bylaws was adopted. To allay their fears, a transitional provision was included i.e. section 2.3.2- to grandfather their status.”

Paragraph 2.3.2 of the 3rd Edition Bylaws states –

“2.3.2 Active Medical Staff

Except those already privileged from the date of the approval of the 3rd Edition of the Medical Staff Bylaws, Active Medical Staff shall consist of Practitioners, including Faculty of the ranks of Senior Instructor and above, who regularly admit and attend to patients at the Hospital, are located within or close enough to the Hospital to provide active and continuous care to their patients, and shall

assume all the functions and responsibilities of membership on the Active Medical Staff, including, where appropriate, emergency consultation and care. Active Medical Staff shall demonstrate substantial commitment to the welfare and Programmes of the Hospital, and specify such commitment as part of the appointment/reappointment process.”

The paragraph starts with the words “*Except those already privileged...*”. As argued by the petitioner, she was already privileged at the time the 3rd Edition Bylaws came into operation. Having been so privileged from 21st May 2012, she would thus be excepted under paragraph 2.3.2 of the Bylaws.

It is noteworthy that upon the coming into force of the 3rd Edition Bylaws, no letter was sent to the petitioner to inform her of any changes in her terms of employment as set out in the letter dated 16th April 2014 reproduced above. The Bylaws do not state that staff of the respondent who have clinical privileges will not benefit from, or are not affected or excepted by Section 2.3.2 of the 3rd Edition Bylaws. Further, the Respondent did not produce evidence to show that the admission privileges granted to private practitioners who were not members of the faculty were different from that granted to the petitioner.

It is further noteworthy that in her resignation letter, the petitioner expressly stated she was resigning from her position as Full Time Faculty. The letter of acceptance of the resignation which is reproduced above, does not make any reference to clinical privileges. It was only after the letter from the University of Nairobi was received that the respondent, in what would appear to be an afterthought, wrote the impugned letter of 17th June 2019, informing the petitioner that her clinical privileges would be automatically relinquished.

Section 3.4 of the Bylaws makes reference to two different resignations. One is from Full Time Faculty of Aga Khan University and the other is Active Medical Staff Membership of Aga Khan University Hospital. The wording of the Section would in my view be logically interpreted to mean, in the case of the petitioner who had separate membership in respect of the two, that the resignation applies only in respect of the membership referred to in the letter of resignation. In this case, she only resigned from Full Time Faculty and not from Active Staff Membership.

Section 3.4 states

“3.4 Automatic Relinquishment/Voluntary Resignation

A Medical Staff Member’s privileges or membership will be considered relinquished, which action shall be final without a right to hearing, if he resigns from the Full Time Faculty of Aga Khan University or Active Medical Staff Membership of Aga Khan University Hospital. Medical Staff Membership and Clinical Privileges shall be automatically relinquished by the member as of the date such resignation becomes effective.”

Section 3.4 does not state that resignation from full time faculty automatically implies resignation from Active Medical Staff Membership or vice versa. The wording refers to one or the other, either *Full Time Faculty of Aga Khan University or Active Medical Staff Membership*. Since these were subject of two separate contracts, the petitioner would have had to resign from each of the two contracts separately. That would be the logical interpretation of Section 3.4 as read with Section 2.3.2 of the 3rd Edition Bylaws. Had the Bylaws used the word “*and*” instead of “*or*” in Section 3.4, the meaning would be different. “*Or*” denotes that the two are disjunctive while “*and*” denotes they are conjunctive. In the manner used in Section 3.4 of the Bylaws, it means the two are disjunctive. That would therefore mean that the petitioner, who had both membership of Faculty and membership of Active Medical Staff did not resign from both but from only one. Any other interpretation would be illogical as appointment as medical staff and appointment as Faculty member are by separate instruments.

This being the case, the letter dated 17th June 2017 from the respondent is discriminative of the petitioner as it would be treating her differently from other Active Medical Staff who were already privileged as referred to in Section 2.3.2 of the 3rd Edition Bylaws. This is also the implication of paragraph 19 of the

replying affidavit of Dr. Twahir where he states that the said clause was intended to protect medical practitioners in private practice who already had clinical privileges in the Hospital.

The respondent who submitted that the private petitioner's contracts were different from the petitioner's who was a Full Time Faculty did not produce a sample of letters of clinical privileges to a non-faculty member to prove that there was a difference between the two. The Bylaws do not provide for a different qualification criterion between a Full Time Faculty member and a private practitioner.

The fact that the term of clinical privileges was only 3 years after which the applicant would apply a fresh and would be vetted before the renewal further supports the petitioner's case that the contract of employment which was 'permanent' was a separate contract and that the two were mutually exclusive such that one could have one without the other.

The provisions for qualification for membership is set out under Section 2.1 of the Bylaws as follows –

2.1 Membership

The Medical Staff consists of licensed Medical and Dental Practitioners permitted by law and by the Hospital to provide patient care services in the Hospital within the scope of Privileges granted.

2.1.1 All its members must have delineated Clinical Privileges that define the scope of patient care services provided in the Hospital.

2.1.2 The Medical Staff develops and adopts Bylaws and Rules to establish a framework of governance and accountability in the process outlined above (Section 1.6)

2.1.3 The professional criteria for Medical Staff membership and for Clinical Privileges are specified. They are designed to help establish an applicant's background, current competence and physical/mental ability to discharge patient care responsibilities. They are also necessary to ensure that patients will receive excellence in quality of care.

2.1.4 Five core criteria are essential in establishing and maintaining qualified Medical Staff:

a) Requirement by Kenya Medical Practitioners and Dentists Board

b) Medical indemnity insurance reflecting specific specialisation as defined in the Credentialing and Privileging policy.

c) Relevant training and experience as defined in the Credentialing and Privileging Policy including source verification of key certification that inform on the current scope of practice

d) Current competence as defined through ongoing medical evaluation annual appraisal.

e) Health status that allows uninterrupted and safe care of patients as defined in the Credentialing and Privileging Policy.

The qualifications requirements do not refer to faculty membership. I thus find that the petitioner's contract for Full Time Faculty and her contract for Clinical Privileges were separate and distinct and that her resignation from Full Time Faculty did not imply resignation from Active Medical Staff Membership. Her resignation having been from Faculty membership, her Clinical Privileges remained intact by virtue of Sections 2.3.2 and Sections 3.4 of the 3rd Edition Bylaws.

The case of **Eric V. J. Makokha v Lawrence Sagini and 2 Others** is thus not applicable in this case as the petitioner's right to Clinical privileges and her Full Time Membership of faculty were subject to two separate contracts that were not dependent on each other, but for which the claimant had to apply separately. The case of **Peter Nderitu** (supra) and **Maurice Adonyo Anyango** (supra) would also not be

applicable here as the petitioner has not complained about her employment but about withdrawal her clinical privileges as a private medical practitioner.

Whether the petitioner's rights under Articles 27, 41(b), 47(2) and 51 have been breached by the respondent

The respondent submitted that the entire petition does not disclose constitutional violations, relying on **Turkana County Government and 20 Others v Attorney General** where the court cited with approval the holding in the case of **Harrkinson v Attorney General of Trinidad and Tobago**. In that decision the court held that failure of a government organ or a public authority or public office to comply with the law does not of its own amount to a constitutional violation to found a right to approach the court by way of a constitutional petition. In the case of **Gabriel Mutava** the court stated that a simple employment matter should be handled by the Employment Court where it does not require constitutional interpretation.

As submitted by Counsel for the Petitioner, the complaint of the petition herein has nothing to do with her rights as an employee. The cases referred to by the respondent are therefore not applicable. Her complaint is the withdrawal of her clinical privileges by letter dated 17th June 2019 by reference to Section 3.4 of the respondent's Bylaws. I do agree with Counsel for the petitioner. As I have already set out above, the petitioner's complaint is in respect of her contract for clinical privileges and not her employment as Full Time Faculty.

The respondent further submitted that the petitioner has not proved that her rights under Articles 27, 41, 47 and 50 have been violated, relying on the decision in **Trusted Society of Human Rights Alliance v Attorney General and 2 Others**. In the instant petition, the petitioner has been very clear, that she is complaining about the withdrawal of her clinical rights which would amount to a violation of the constitutional rights she has complained of.

I do agree with the respondent to the extent that the petitioner has not demonstrated how her rights under Article 41(2) of the Constitution which provides for right to fair remuneration, reasonable working conditions, to participate in union matters or to go on strike, have been infringed by the respondent. In the submissions, the petitioner only refers to rights to reasonable working conditions. Suspension of Admitting Rights does not amount to infringement of Article 41(2) as alleged.

In her submissions on violation of Articles 47(2) the petitioner argued that the respondent breached her rights by –

- i *Failure of the respondent to uphold the Constitution.*
- ii *Failure to convene the Standard Audit and Ethics Committee.*
- iii *Failure to refer the issue to Standard Audit and Ethics Committee.*
- iv *Failure to invite the petitioner in the Standard Audit and Ethics Committee to answer to any charges if at all.*

I would again agree with the respondent that these particulars do not demonstrate any violation of her rights under Article 47(2) of the Constitution.

The same applies to Article 40(1) which provides to the right to fair hearing in a court or other independent and impartial tribunal or body. This is not applicable to the petitioner's situation as there was no matter before a tribunal or court, and administrative action by the respondent would not fall under the category of disputes to be determined in accordance with Article 50(1).

I have however already demonstrated above that the letter dated 17th June 2019 discriminates against the petitioner by applying Section 2.3.2 as read with 3.4 discriminately against her as compared to other private practitioners who are exempted from application of Section 2.3.2 of the 3rd Edition Bylaws by

virtue of having been already practicing at the hospital at the time of coming into force of the Bylaws.

Having found that the petitioner's resignation from Full Time Faculty did not affect her Clinical Privileges, and having found that the letter dated 17th June 2019 discriminates against her as compared to other private practitioners who were excepted by virtue of Section 2.3.2 of the 3rd Edition Bylaws, I make the following orders –

1. A declaration be and is hereby issued that the conduct of the Respondent was a discrimination against the petitioner.
2. An Order be and is hereby issued quashing the letter dated 17th June 2019 from the respondent to the extent it purports to cancel the clinical privileges of the petitioner on the 30th June 2019
3. Costs of the petition be borne by the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE